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March 5, 1999

BY FACSIMILE AND OVERNIGHT MAIL

Dockets Management Branch (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, Maryland 20852

Re: Docket No. 98N-0148
64 Federal Register 1629 (Jan. 11, 1999)

Supplemental Comments of the Dietary Supplement Safety and Science Coalition

I. Introduction

On behalf of the Dietary Supplement Safety and Science Coalition ("DSSSC")[1], these comments are submitted in response to the questions raised by panelists on February 19, 1999, at the FDA public meeting regarding the U.S. position with respect to the upcoming meeting of the UN Commission on Narcotic Drugs ("CND") on the scheduling of ephedrine. These comments supplement the comments submitted to the docket by the DSSSC on February 10, 1999.

The DSSSC is encouraged that the U.S. State Department has announced that the U.S. government will oppose the scheduling of ephedrine under the Convention on Psychotropic Substances ("1971 Convention") at the CND meeting. These comments provide further support for that laudable position. We strongly urge the U.S. government to advocate this position vigorously with other nations who are members of the CND.

[1] The DSSSC is comprised of several businesses in the United States that either manufacture or distribute dietary supplement products containing herbal ephedra in the United States and globally. The members of the DSSSC are: The Chemins Company, Inc., Enrich International, Inc., Market America Inc., Metabolife International, Inc., Natural Balance, Inc., Omnitrition International, Inc., and Starlight International, Ltd. The DSSSC was organized to support and develop consistent and responsible standards for the safe consumption of dietary supplements, including the use of science-based approaches when addressing regulatory issues concerning dietary supplements generally, and ephedra in particular.

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II. Responses to Questions Posed by Panelists at the FDA Public Meeting

QUESTION # 1:

What is the nature of the conflict between the 1971 Convention and the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("1988 Convention")?

A. Overview

Adding ephedrine to Schedule IV of the 1971 Convention, when it is already listed in and regulated by the 1988 Convention, will create confusion among the Parties and make enforcement of any restrictions on ephedrine problematic. It is unclear whether the regulatory requirements (such as labeling and recordkeeping for imports and exports) and enforcement tools (such as the authority to seize listed substances used as precursors) applicable to ephedrine as a chemical listed under the 1988 Convention would still apply if the substance is scheduled as a controlled substance under the 1971 Convention. It is also unclear whether actions in compliance with one of the Conventions would satisfy the requirements of the other, or if separate record keeping and monitoring systems, for example, would be necessary under each Convention.

As the WHO's Expert Committee on Drug Dependence ("Committee") indicated in its scheduling recommendation, the overlapping jurisdictions of the 1971 Convention and the 1988 Convention would likely make "full effective international regulations of ephedrine difficult."[2] The Committee also stated that interpretation of these two Conventions by the International Narcotic Control Board ("Board") and WHO is needed.[3] A formal interpretation, however, has not been promulgated. Accordingly, it is not prudent to add additional international regulations when the jurisdiction of the proposed regulations is in question.

B. Import and Export Restrictions and Reporting

The 1971 Convention allows Parties to prohibit the importation of substances included in the Convention's schedules, though Parties can grant import licenses on a case-by-case basis, under Article 13, paragraphs 1 and 3. Also under the 1971 Convention, Parties are to furnish reports to the Secretary-General regarding any case of illicit traffic in scheduled substances on a discretionary basis; *i.e.,* regarding those cases "which they [the Party] consider important." Article 16, paragraph 3.[4] Parties are also required to supply to the Board reports regarding the quantities of scheduled substances exported and imported. Article 16, paragraph 4.

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2 64 Fed.Reg. 1629, 1630 (January 11, 1999).

3 Id.

4 Under Article 21, paragraph (b), parties are to provide copies of reports provided under Article 16 of illicit traffic or seizure to the other Parties directly concerned.

In contrast, the 1988 Convention does not provide a specific provision regarding the prohibition of the import of listed substances. Furthermore, under the 1988 Convention, Parties are obligated to notify the proper authorities in the other Party involved if "there is reason to believe that the import, export or transit" of a listed substance is intended for the illicit manufacture of narcotic drugs. Article 12, paragraph 9(c). This provision requires the reporting for all such situations, not just those that the Party considers important. The Party furnishing such information may require that the Party receiving it keep confidential any trade, business, commercial or professional trade secret or trade process. Article 12, paragraph (11). The 1971 Convention does not provide Parties the opportunity to require the information they provide be maintained as confidential. Parties are also required, under the 1988 Convention, to provide to the Board annually information on the amount of listed substances seized, and their origin, as well as the methods of diversion and illicit manufacture. Thus, 1988 Convention requires different information in the annual reports to the Board for listed substances than the 1971 Convention does for controlled substances.

C. License Requirements

Under Article 8 of the 1971 Convention, Parties shall require licenses for manufacturers, exporters and importers, and distributors of scheduled substances.[5] The 1988 Convention states that Parties, "without prejudice to the provisions of the 1971 Convention," may require licenses for the manufacturing and distribution of listed substances. Article 12, paragraph 8 (emphasis added). Thus, if ephedrine were added to a schedule of the 1971 Convention, it is unclear if the requirements of the earlier Convention would supercede the latter one, resulting in a mandatory licensing requirement.

D. Seizure and Confiscation Authority

The 1971 Convention states that "any psychotropic substance or other substance, as well as any equipment" used in an offense of regulations adopted by a Party in pursuance of its obligations under the convention is liable to seizure and confiscation. Article 22, paragraph 3. The 1988 Convention provides much broader authority for the seizure not only of substances or equipment used in violation of the Convention, but also of profits made by such violations. The 1988 Convention states that each Party shall adopt measures to enable the confiscation of proceeds or property, the value of which corresponds to that of such proceeds from offenses of the laws and regulations enacted pursuant to the 1988 Convention. Article 5, paragraph 1. Furthermore, under the 1988 Convention, Parties are to adopt measures to allow its authorities to "identify, trace, and freeze or seize proceeds, property, instrumentalities and the like" for the eventual confiscation. Article 5, paragraph 2. There has been no determination, however, whether these enforcement provisions would still be available to Parties for a substance that is listed under both the 1971 and 1988 Conventions.

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[5] Even for substances for which a Party has indicated that it will not enforce provisions of the 1971 Convention due to exceptional circumstances, licenses for manufacturers, traders, and distributors are still required. Licenses for manufacturers are also required for preparations excluded under Article 3.

QUESTION # 2

What is the distinction between ephedrine and herbal ephedra?

Herbal ephedra, which contains very low levels of naturally occurring ephedrine alkaloids, is distinguishable from the drug substance ephedrine. Herbal ephedra has been consumed safely and beneficially in traditional herbal products for more than 5000 years in China, and for centuries in other countries. Today, herbal ephedra is widely and beneficially used in the United States and throughout the world in lawful food and dietary supplement products.

The lack of significant evidence of abuse of herbal ephedra and products containing herbal ephedra is linked in part to the fact that herbal ephedra does not behave like pure ephedrine when ingested and thus has weaker effects. The differences between herbal ephedra and pure ephedrine are believed to be due to (1) the slower absorption of ephedrine alkaloids from herbal ephedra than from pure ephedrine, and (2) the presence of other constituents in herbal ephedra that may counter the effects of the ephedrine itself.

There is also no evidence that herbal ephedra produces a state of dependence or addiction, particularly when present in low levels in dietary supplement products. There is no evidence that dietary supplements containing herbal ephedra produce a state of dependence, nor is there any evidence of widespread addiction to such products.[6] Furthermore, dietary supplement products containing herbal ephedra have not been known to cause hallucinations or disturbances in motor function.

Moreover, although potential use as a precursor is not a proper basis for scheduling under the 1971 Convention, there is little or no evidence that herbal ephedra or dietary supplements containing herbal ephedra have been or could be successfully used as a precursor for illicit drug production. Pure or synthetic ephedrine is the substance typically used to manufacture methamphetamines and similar controlled substances.

In contrast, the complex matrix of herbs and other ingredients present in this type of dietary supplement is not conducive to easy conversion to produce pure ephedrine, which in turn makes conversion of the ephedrine into methamphetamines or other controlled substances difficult, if not impossible. The absence of evidence supporting the use of dietary supplement products that contain herbal ephedra to synthesize methamphetamines is to be expected. The procedure to synthesize ephedrine, and subsequently produce methamphetamines, is complex, if not impossible, when the starting material is ephedra plant materials or diluted extracts of ephedra plant materials. Importantly, however, the level of complexity increases exponentially when the starting material is a dietary supplement product that contains herbal ephedra, and the complexity further increases as other natural ingredients are combined with herbal ephedra. Dietary supplement products that contain ephedra typically contain numerous other ingredients, including stabilizers, fillers, other

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6 Such products do not produce a state of "euphoria" and have no functional resemblance to currently controlled substances.

herbs, vitamins, etc. Extracting pure ephedrine from a multi-ingredient dietary supplement product is an arduous, expensive, and time-consuming task that effectively removes such products from use as precursor materials.

QUESTION #3

What would be the economic consequences of scheduling herbal ephedra?

Most companies that market dietary supplement products that contain herbal ephedra are private companies that do not report sales and earnings figures to the public. Nevertheless, retail sales of herbal ephedra dietary supplement products are conservatively estimated to exceed $1.5 - $2 billion per year. These products, which are among the more popular products in a rapidly expanding industry, are sold via traditional retail chains (drug stores, health food stores, etc.), mail-order catalogs, and direct sales distribution networks. It is currently estimated that there are over 500,000–750,000 independent distributors who make direct sales of dietary supplements that contain herbal ephedra. Most of these distributors depend upon income derived from these sales to supplement their household income.

The U.S. Small Business Administration has also emphasized in comments to the FDA the importance of this marketplace.[7] Millions of Americans consume dietary supplements containing herbal ephedra every year and several hundred thousand small businesses are involved in the manufacture, distribution, and sale of these products.

QUESTION #4

How are other countries expected to vote at the upcoming meeting of the CND?

To our knowledge, most countries have not yet disclosed how they intend to vote at the upcoming CND meeting. The one exception is the United Kingdom, which has indicated that it intends to join the U.S. State Department in voting against scheduling.

In addition, based upon our discussions with representatives from many of these countries, there appears to be a virtual absence of concern regarding the abuse potential of herbal ephedra. We have not encountered representatives from even a single nation that have characterized herbal ephedra as the subject of an abuse or misuse problem.

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[7] See Comments from the Small Business Administration to FDA regarding FDA's proposed rule for dietary supplements containing ephedrine alkaloids. (February 3, 1998).

We appreciate the opportunity to submit these supplemental comments and applaud the decision of the U.S. government to oppose the scheduling of ephedrine at the upcoming CND meeting. We urge the U.S. CND representatives to ask other countries to take a similar position against scheduling.

Respectfully submitted,

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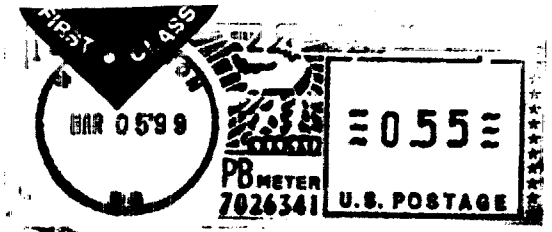

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